

INITIAL STATEMENT OF REASONS AND PUBLIC REPORT
DEPARTMENT OF PESTICIDE REGULATION

Title 3. California Code of Regulations

Adopt Section 6531

Amend Sections 6502, 6511, and 6530

Pertaining to the Licensing and Certification of Qualified Pesticide Applicators

This is the Initial Statement of Reasons required by Government Code section 11346.2 and the public report specified in section 6110 of Title 3, California Code of Regulations (3 CCR). Section 6110 meets the requirement of Title 14 CCR section 15252 and Public Resources Code section 21080.5 pertaining to state regulatory programs certified under the California Environmental Quality Act.

SUMMARY OF PROPOSED ACTION/PESTICIDE REGULATORY PROGRAM
ACTIVITIES AFFECTED

The Department of Pesticide Regulation (DPR) proposes to amend 3 CCR sections 6502, 6511, and 6530, and adopt section 6531. The pesticide regulatory program activities that will be affected by this proposal are those pertaining to the licensing and certification of qualified pesticide applicators. The proposed regulatory action would add existing qualified applicator subcategories to section 6530 for clarity purposes; prohibit applicators qualified to work in subcategory Q - Maintenance Gardener Pest Control (maintenance gardeners) from purchasing or using federally restricted-use pesticides or California restricted materials; establish a new subcategory P for microbial pest control uses; require only eight hours of approved continuing education hours within each two-year license or certificate period for subcategory M - Antifouling-Tributyltin, subcategory N - Sewer Line Root Control, and subcategory P - Microbial Pest Control; and delete an incorrect qualified applicator license (QAL) reference under the continuing education requirements for maintenance gardeners.

SPECIFIC PURPOSE AND FACTUAL BASIS

DPR protects human health and the environment by regulating pesticide sales and use and by fostering reduced-risk pest management. DPR's strict oversight begins with product evaluation and registration; and continues through statewide licensing of commercial and private applicators, pest control businesses, and consultants; environmental monitoring; and residue testing of fresh produce. This statutory scheme is set forth primarily in Divisions 6 and 7 of the Food and Agricultural Code (FAC).

DPR's Licensing and Certification Program administers examinations and licenses or certifies pest control dealer designated agents, pest control aircraft pilots, qualified applicators, private applicators, and agricultural pest control advisers. The Licensing and Certification Program also licenses pest control businesses, including maintenance gardener pest control businesses, pest control dealers, and pesticide brokers.

Amend Division 6, Chapter 3, Subchapter 1 Heading from “Licensing” to “Licensing and Certification”

FAC section 12203 currently lists 11 qualified applicator categories that correspond to existing QALs and qualified applicator certificates (QACs) offered by DPR. All QAL and QAC categories are also specified in section 6530 under subchapter 1 “Licensing.” Since the title of subchapter 1 currently only refers to licensing, DPR proposes to revise the title of subchapter 1 to “Licensing and Certification” to accurately reflect the scope of qualified applicator categories covered by the subchapter.

Addition of Qualified Applicator Subcategories

Title 40 of the Code of Federal Regulations (40 CFR) section 171.3(c), as well as FAC section 12203.1, authorize the Director to designate subcategories within the qualified applicator categories listed in section 12203, as necessary. Pursuant to FAC section 12203.1, five subcategories (L - Wood Preservation, M - Antifouling-Tributyltin, N - Sewer Line Root Control, O - Field Fumigation Pest Control, and Q - Maintenance Gardener Pest Control) were established and have been included on DPR’s application forms, with the exception of subcategory Q. Under the current system, applicants become qualified in subcategory Q only after taking the category B examination and requesting DPR to downgrade their license or certificate to subcategory Q. For clarity purposes, DPR proposes to add all five of these subcategories in section 6530. In addition, DPR proposes to establish subcategory P - Microbial Pest Control. Subcategory P would apply to individuals using registered sanitation service pesticides, such as applications to potable water lines, evaporative condensers, and cooling towers as well as individuals using sulfur dioxide to sanitize corks and barrels used in wine production. Wine cork and barrel sanitation is included in this subcategory because the only sulfur dioxide product currently registered for these uses is a federally restricted-use pesticide, meaning the product is for retail sale to or use by only a QAL or QAC, or persons under their direct supervision. By creating a new subcategory P, individuals using registered sanitation service pesticides would no longer be required to take the more comprehensive category A examination which encompasses all residential, industrial, and institutional pesticide uses. Instead, individuals conducting microbial pest control would have a more specific subcategory, along with a more appropriate examination.

By listing all available subcategories in regulation, applicants will have a clear understanding of all the qualified applicator licenses and certificates offered by DPR. In section 6502(c), DPR proposes to revise the following application forms: Qualified Applicator License Application PR-PML-001 (Rev. 04/07), Qualified Applicator Certificate Application PR-PML-001A (Rev. 04/07), Maintenance Gardener Pest Control Business License Application PR-PML-004 (Rev. 09/04), and Pest Control Business License Application PR-PML-042 (Rev. 09/04). These application forms, incorporated by reference, will be revised to reflect the new subcategory P for microbial pest control and subcategory Q for maintenance gardener pest control as well as other editorial changes. These editorial changes include deleting the request for an applicant's social security number (currently optional) and removing the “duplicate/replacement license” and “name/address change” options under application type since DPR requires the use of another

form to complete these requests. Copies of the revised forms are included in the rulemaking file and are available upon request from DPR.

Prohibit Maintenance Gardeners Certified in Subcategory Q From Purchasing or Using Federally Restricted-Use Pesticides or California Restricted Materials

DPR proposes to prohibit maintenance gardeners certified as subcategory Q maintenance gardeners from purchasing or using federally restricted-use pesticides or California restricted materials. In 1980, FAC section 11704 was enacted (Chapter 795, Statutes of 1980) and established maintenance gardeners who engage in pest control for hire incidental to the business as a pest control operation. The Licensing and Certification Program now licenses maintenance gardener pest control businesses and licenses or certifies maintenance gardeners in accordance with FAC section 11704, with the authorization to apply restricted-use pesticides and restricted materials.

An individual must have a DPR issued QAL or QAC if they use or supervise the use of federally restricted-use pesticides or state restricted materials. An applicator must have a QAL if the applicator supervises the pesticide applications made by a licensed pest control business and is responsible for the safe and legal operation of the business. However, FAC section 12201.1 makes an exception to the QAL requirement for maintenance gardener pest control businesses by stating, “It is unlawful for any person to act in a supervisory capacity or position for a pest control business, except a business licensed only in the maintenance gardener category pursuant to Section 11705, unless the person has a qualified applicator license.” FAC section 11704 states, “A person who is regularly engaged in the business of maintenance gardening and who desires to engage in pest control for hire incidental to that business shall qualify for a pest control business license in the maintenance gardener category by passing the certified commercial applicators examination in both the laws and regulation and the landscape maintenance categories.” Section 6000 of 3 CCR defines certified commercial applicator as “a person holding a valid qualified license by the director” and “a person holding a valid qualified applicator certificate by the director.” Thus, an individual with a QAC can supervise pesticide applications and be responsible for the safe and legal operation of a maintenance gardener pest control business.

Although QACs are authorized to use or supervise the use of federally restricted-use pesticides or state restricted materials, FAC section 14151 authorizes the director to “specify the pesticide applications that shall be made by or under the supervision of a person holding a valid qualified applicator certificate.” In addition, FAC section 14005 states that, “The director shall adopt regulations which govern the possession and use of any restricted material which he or she finds and determines is injurious to the environment or to any person, animal, crop, or other property.” FAC section 14015 states, “Except as provided by regulation adopted by the director, a restricted material shall only be possessed or used by, or under the direct supervision of, a private applicator, who is certified pursuant to Section 14093, or a certified commercial applicator, as defined by Section 6000 of Title 3 of the California Code of Regulations.” Therefore, FAC sections 14005, 14015, and 14151 provide DPR with the authority to adopt regulations that prohibit maintenance gardeners from using restricted materials, which includes federally restricted-use pesticides by reference.

DPR proposes to adopt section 6531 to prohibit maintenance gardeners from purchasing and using federally restricted-use pesticides and California restricted materials because maintenance gardeners do not typically purchase or use these types of pesticides. Maintenance gardener businesses are often very small companies, normally a one-person operation or a business with one or two employees, that service residential and commercial properties. Their use of pesticides is limited and is typically focused on the use of herbicides, insecticides, and fungicides. The pest control they perform is incidental to their physical landscape maintenance activities that consist of fertilizing, planting, pruning, and general cleanup of ornamental and turf plantings indoors, in commercial parks, or surrounding structures.

Currently, all maintenance gardeners using pesticides must take at least the QAC examination in the Landscape Maintenance Pest Control category B to legally operate. The category B study guide and examination was established in 1976 and was intended to meet the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) certification requirements to use restricted use pesticides. To meet this standard, the category B study material and examination were developed to be more challenging and comprehensive since they were designed for those who may be regularly applying both general-use and federally restricted-use pesticides or California restricted materials. As a result, individuals who wish to operate as a maintenance gardener pest control business may be prevented from doing so in part to the requirement that they study a comprehensive study guide designed for a full-fledged pest control business. As evidence, DPR, at this time, only licenses 1,057 maintenance gardener pest control businesses.

DPR wants to encourage maintenance gardeners to become qualified applicators by clarifying that subcategory Q is a specific certification option. Although pesticide use by maintenance gardeners is limited, they still need to understand issues involved with using pesticides and potential impacts to residents, children, pets, and the environment. Maintenance gardeners must also be appropriately trained to use and dispose of pesticides in a proper and safe manner. Improper disposal of excess pesticides and rinsates as well as drift from pesticide applications can have serious consequences. DPR wants to create an incentive for maintenance gardeners to become certified by offering a subcategory that is suitable, with a new study guide and examination specifically designed for the scope of work being performed.

The requirements for maintenance gardeners have been formulated in collaboration with the Agricultural Pest Control Advisory Committee (APCAC) on an ongoing basis since 2004. APCAC, established by statute in FAC, advises the Director in all matters concerning the licensing, certification, and regulation of persons and firms providing pest control advice and services in California. DPR's proposal to include the prohibition on using restricted-use pesticides or California restricted materials by subcategory Q applicators was presented to the APCAC on November 24, 2008. The APCAC approved the recommendations and requested that DPR move forward with a regulatory package to implement the proposed changes.

The proposed changes to section 6530 are also supported by the county agricultural commissioners. County agricultural commissioners are responsible for inspecting pesticide application and enforcing legal use of pesticides. According to a March 21, 2008 press release from the Deputy Agricultural Commissioner in San Luis Obispo, "Unlicensed use of pesticides by Maintenance Gardeners is widespread and typically involves other pesticide use violations.

Maintenance gardeners are either not aware of the pesticide licensing requirements or have chosen not to become licensed.”

This proposal meets the overall objective of FAC section 11501(b), which directs DPR to protect the environment from environmentally harmful pesticides by prohibiting, regulating, or ensuring proper stewardship of those pesticides. Several studies have associated the residential use of insecticides containing pyrethroids, particularly the use of lawn care products, with increased toxicity of sediments in California creeks that drain subdivisions of single-family homes. Results from several studies, including key studies conducted by the University of California at Berkeley and Southern Illinois University, supported by grants from the California State Water Resources Control Board, have shown that pyrethroids are degrading sediment quality in several California areas. In fact, DPR has initiated the “re-evaluation” process for pyrethroid pesticide products based on the discovery and publication of toxic effects of pyrethroids in California.

Proper use of pesticides by pest control professionals is critical to ensuring the protection of human health and the environment. Encouraging more maintenance gardeners to seek certification by providing the subcategory Q option will help ensure that those individuals making pest control decisions do so with full knowledge of state and federal laws and regulations, and utilize best pest management practices in the control of pests.

In summary, DPR and APCAC recognize that current licensing and certification standards may discourage some maintenance gardeners from applying for a maintenance gardener pest control business license and obtaining the qualifications to use pesticides incidental to their business. Therefore, a more focused license subcategory that reflects the type of work being performed in these situations is necessary to ensure that maintenance gardeners are knowledgeable about the pesticides they apply. The proposed changes to sections 6530 and 6531, along with a new subcategory Q study guide and examination reflecting the type of work performed by maintenance gardeners, will provide more flexibility for maintenance gardeners, while still demanding a level of skill and expertise to ensure maintenance gardeners use pesticides in a safe manner that is protective to human health and the environment.

Changes to Continuing Education for Qualified Applicators

Since subcategory Q maintenance gardeners will only hold a QAC and not a QAL, DPR seeks to delete the reference to “qualified applicator license holders” in section 6511(c). This section currently refers to “. . . qualified applicator license and certificate holders engaged in the business of maintenance gardening . . .” Therefore, DPR would like to amend this section so it is consistent with FAC sections 12201.1 and 11704 and reads, “. . . qualified applicator certificate holders engaged in the business of maintenance gardening . . .”

Additionally, DPR proposes to reduce the amount of continuing education hours required for QAL and QAC holders in subcategory M (Antifouling-Tributyltin), subcategory N (Sewer Line Root Control), and subcategory P (Microbial Pest Control). Without specifying this reduction in regulation, these subcategories require twenty continuing education hours per two-year license or certificate period as specified for category A, a broad category encompassing all residential, industrial, and institutional pest control activities. However, since subcategories M, N, and P

correspond to very specific pest control activities, a minimum of eight hours of continuing education is more appropriate to account for the limited scope of work. Establishing a more appropriate amount of continuing education hours for limited pest control activities is consistent with current regulatory practices. For example, qualified applicators in the seed treatment pest control category are subject to a minimum of four hours of approved continuing education while maintenance gardeners are subject to eight hours of continuing education instead of twenty hours.

CONSULTATION WITH OTHER AGENCIES

DPR, the county agricultural commissioners, representatives of the California Association of Pest Control Advisers, Pesticide Applicators Professional Association, and APCAC have reviewed and support the proposed amendments to section 6530. DPR is also working with the University of California at Davis to develop a study guide and examination for subcategory Q.

Copies of APCAC meeting minutes are contained in the rulemaking file.

ALTERNATIVES TO THE PROPOSED REGULATORY ACTION [GOVERNMENT CODE SECTION 11346.2(B)]

DPR has not identified any feasible alternatives to the proposed regulatory action that would lessen any possible adverse economic impacts, including any impacts on small businesses, and invites the submission of suggested alternatives. Maintaining the status quo is the only other feasible alternative. However, the purpose of this regulatory action is to provide an alternative to the status quo that is likely to contribute to an improved rate of compliance and protection of public health and the environment.

As discussed in the Notice of Proposed Regulatory Action that was published in the *California Regulatory Notice Register*, DPR has determined that the adoption of this regulation will have a cost impact on businesses, but provides a cost reduction for maintenance gardeners compared to complying with the current requirements.

ECONOMIC IMPACT ON BUSINESSES

The proposed regulations will have an economic impact upon business. The document relied upon to make this determination is listed in the “Documents Relied Upon” section of this initial statement of reasons and is available from DPR.

IDENTIFICATION OF ANY SIGNIFICANT ADVERSE ENVIRONMENTAL EFFECT THAT CAN REASONABLY BE EXPECTED TO OCCUR FROM IMPLEMENTING THE PROPOSAL

DPR’s review of the proposed action showed that no significant adverse environment effect to California’s air, soil, water, plants, fish, or wildlife can reasonably be expected to occur from implementing the proposal. In fact, the proposed action will enhance environmental protection.

Therefore, no alternatives or mitigation measures are proposed to lessen any significant adverse effects on the environment.

The proposed action would amend section 6530 by listing existing qualified applicator subcategories and a new subcategory P for microbial pest control in regulation as well as prohibit maintenance gardeners (subcategory Q) from using federally restricted-use pesticides and California restricted materials. The change potentially will increase the number of competent, skilled, certified maintenance gardeners and prohibit use of restricted-use pesticides and restricted materials by these applicators.

EFFORTS TO AVOID UNNECESSARY DUPLICATION WITH FEDERAL REGULATIONS

The proposed regulatory action does not duplicate or conflict with the Code of Federal Regulations. Subcategory P is, in fact, a necessary state regulatory action resulting from recent federal regulatory action.

DOCUMENTS RELIED UPON

- Agricultural Pest Control Advisory Committee Meeting Minutes dated October 20, 2004; January 19, 2005; April 12, 2005; July 19, 2005; November 24, 2008; and April 8, 2009.
- Amweg, Erin. L., Donald P. Weston, Jing You, and Michael J. Lydy, "Pyrethroid Insecticides and Sediment Toxicity in Urban Creeks from California and Tennessee," *Environmental Science & Technology*, Vol. 40, No. 5, 2006, pp. 1700-1706.
- Campbell, Janice, "Maintenance Gardener Pesticide Use Legal?" March 21, 2008, <<http://www.slocounty.ca/gov/AssetFactory.aspx?did=16104>> (November 10, 2008).
- Weston, D.P., R.W. Holmes, J. You, and M. J. Lydy, "Aquatic Toxicity Due to Residential use of Pyrethroid Insecticides," *Environmental Science & Technology*, Vol. 39, No. 24, 2005, pp. 9778-9784.
- Consultation on Draft Regulations on Subcategory P and Q. California Environmental Protection Agency, Economic Studies Section, Air Resources Board. Memorandum from Stephen Storelli to Linda Irokawa-Otani, Regulations Coordinator, DPR. January 13, 2010.